

**FILED**

**MAR 10 2013**

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DISTRICT OF NEVADA  
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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

REYNALDO AQUINO,

Petitioner,

vs.

DWIGHT NEVEN, et al.,

Respondents.

Case No. 2:11-cv-01587-PMP-NJK

**ORDER**

Before the court are the petition for a writ of habeas corpus (#5), respondents' motion to dismiss (#16), petitioner's opposition (#25), and respondents' reply (#26). For the reasons stated below, the court grants the motion in part.

After a jury trial in state district court, petitioner was convicted of conspiracy to commit robbery with the use of a deadly weapon (count 1), attempted robbery with the use of a deadly weapon (count 2), and attempted murder with the use of a deadly weapon (count 3). Ex. 30 (#18). Petitioner appealed. The Nevada Supreme Court affirmed on most issues. It reversed and remanded for the district court to enter an amended judgment of conviction for two reasons. First, the Nevada Supreme Court determined that imposition of the deadly-weapon enhancement of Nev. Rev. Stat. § 193.165 for the crime of conspiracy to commit robbery with the use of a deadly weapon was incorrect. Second, the Nevada Supreme Court wanted the district court to clarify how the sentences for the three counts ran concurrently and consecutively. Ex. 48, at 14-16 (#19).

The district court then entered an amended judgment. It corrected the sentence for count 1. It directed that the sentence for counts 2 and 3 run consecutive to each other and concurrently with

1 count 1. The court gave petitioner 498 days of credit for time spent in jail before the original  
2 sentencing. Ex. 54 (#19).

3 Petitioner then filed a post-conviction habeas corpus petition in state district court. Ex. 56  
4 (#19). The district court denied the petition. Ex. 70 (#20). Petitioner appealed, and the Nevada  
5 Supreme Court affirmed. Ex. 87 (#20).<sup>1</sup>

6 Respondents first argue that ground 5 and part of ground 1 are unexhausted. Before a  
7 federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the  
8 remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner  
9 must fairly present that ground to the state's highest court, describing the operative facts and legal  
10 theory, and give that court the opportunity to address and resolve the ground. See Duncan v. Henry,  
11 513 U.S. 364, 365 (1995) (per curiam); Anderson v. Harless, 459 U.S. 4, 6 (1982).

12 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state  
13 remedies only if he characterized the claims he raised in state proceedings specifically as federal  
14 claims. In short, the petitioner must have either referenced specific provisions of the federal  
15 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.  
16 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law that  
17 applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158  
18 (9th Cir. 2003) (en banc). “The mere similarity between a claim of state and federal error is  
19 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles,  
20 such as due process, equal protection, and the right to a fair trial, are insufficient to establish  
21 exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

22 Ground 1 has two parts. In ground 1(1), petitioner claims that the jury instruction on  
23 attempted robbery created an improper, mandatory presumption. This part is exhausted. In ground  
24 1(2), petitioner claims that jury instruction 14 on attempted murder fails to adequately describe the  
25 state-of-mind element, because it told the jury that they did not need to find premeditation and  
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27 <sup>1</sup>Petitioner also filed motions to modify his sentence and to correct an illegal sentence. Ex.  
28 60, 62 (#20). These motions are not relevant to the matter before the court.

1 deliberation. Respondents argue that on direct appeal, petitioner did not present this as an issue of  
2 federal law. Respondents are correct. In support of his argument, petitioner cited two state-law  
3 cases, Graves v. State, 420 P.2d 618 (Nev. 1966), and Ramos v. State, 592 P.2d 950 (Nev. 1979).  
4 See Ex. 43, at 11 (#19). In rejecting petitioner's argument, the Nevada Supreme Court noted that in  
5 Keys v. State, 766 P.2d 270, 273 & n.1 (Nev. 1988), it had clarified some confusion created by  
6 Graves and had held that premeditation and deliberation are not elements of attempted murder and  
7 that there are no degrees of attempted murder. Ex. 48, at 6-7 (#19). Keys also is a state-law case.  
8 Petitioner has not exhausted ground 1(2).

9 In ground 5, petitioner claims that the sentence structure (counts 2 and 3 run concurrent with  
10 count 1, but consecutive to each other), violates the Sixth Amendment's right to a fair trial and the  
11 Fourteenth Amendment's guarantee of due process. Petitioner did not present this issue to the  
12 Nevada Supreme Court as an issue of federal law. Ex. 43, at 5-6 (#11). He mentioned "due  
13 process" at the start of that section of his fast-track statement, but he did not explicitly mention the  
14 federal constitution. The mention of "due process" is not sufficient to make the claim an issue of  
15 federal law. Hiivala, 195 F.3d at 1106.

16 Petitioner asks the court to stay this action while he returns to state court to exhaust these  
17 grounds. This court may stay the action if petitioner shows that he has "good cause for his failure to  
18 exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the  
19 petitioner engaged in intentionally dilatory litigation tactics." Rhines v. Weber, 544 U.S. 269, 278  
20 (2005). The court declines the request and will deny the grounds pursuant to 28 U.S.C.  
21 § 2254(b)(2) because they lack merit.

22 As noted above, ground 1(2) concerns jury instruction 14, which stated, "It is not necessary  
23 to prove the elements of premeditation and deliberation in order to prove attempted murder." Ex.  
24 27 (#18). Petitioner claims that this jury instruction allowed the jury to find him guilty without  
25 finding beyond a reasonable doubt the elements of premeditation and deliberation. In Keys, the  
26 Nevada Supreme Court held that there are no degrees of attempted murder and that premeditation  
27 and deliberation are not elements of attempted murder. 766 P.2d at 273 & n.1. Petitioner  
28 committed his acts on November 20, 2006, almost 18 years after the Keys decision. See Ex. 10

1 (#17). Because premeditation and deliberation are not elements of attempted murder, the instruction  
2 was correct. Ground 1(2) is without merit.

3 Concerning ground 5, petitioner has not raised an issue of federal law. "The decision  
4 whether to impose sentences concurrently or consecutively is a matter of state criminal procedure  
5 and is not within the purview of federal habeas corpus." Cacoperdo v. Demosthenes, 37 F.3d 504,  
6 507 (9th Cir. 1994) (citing Ramirez v. Arizona, 437 F.2d 119, 120 (9th Cir. 1971)). Ground 5 is  
7 without merit.

8 Respondents argue that ground 6 is procedurally defaulted. Much of ground 6 repeats  
9 allegations in ground 5. Petitioner also alleges in ground 6 that the amended judgment of conviction  
10 doubled his sentence. Petitioner raised this claim in his state habeas corpus proceedings. On  
11 appeal, the Nevada Supreme Court ruled:

12 Finally, appellant claimed that his due process rights were violated because the amended  
13 judgment of conviction increased his sentence after he had already begun serving it. This  
14 claim could have been raised on direct appeal and was therefore procedurally barred absent a  
15 demonstration of good cause and actual prejudice. NRS 34.810(1)(b). Appellant  
16 demonstrated good cause because the amended judgment of conviction was filed after  
issuance of the remittitur on his direct appeal; however, appellant failed to demonstrate  
actual prejudice because the amended judgment of conviction did not increase his sentence.  
See Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). We therefore conclude  
the district court did not err in denying this claim.

17 Ex. 87, at 2-3 (#20) (footnote omitted).

18 A federal court will not review a claim for habeas corpus relief if the decision of the state  
19 court regarding that claim rested on a state-law ground that is independent of the federal question  
20 and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 730-31 (1991).

21 In all cases in which a state prisoner has defaulted his federal claims in state court  
22 pursuant to an independent and adequate state procedural rule, federal habeas review  
23 of the claims is barred unless the prisoner can demonstrate cause for the default and  
actual prejudice as a result of the alleged violation of federal law, or demonstrate that  
failure to consider the claims will result in a fundamental miscarriage of justice.

24 Id. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). The grounds for dismissal upon  
25 which the Nevada Supreme Court relied in this case are adequate and independent state rules. Vang  
26 v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003).

1 To demonstrate cause for a procedural default, the petitioner must “show that some objective  
2 factor external to the defense impeded” his efforts to comply with the state procedural rule. Carrier,  
3 477 U.S. at 488.

4 To show prejudice, “[t]he habeas petitioner must show ‘not merely that the errors at . . . trial  
5 created a possibility of prejudice, but that they worked to his actual and substantial disadvantage,  
6 infecting his entire trial with error of constitutional dimensions.’” Carrier, 477 U.S. at 494 (quoting  
7 United States v. Frady, 456 U.S. 152, 170 (1982)) (emphasis in original).

8 The court disagrees with petitioner that the Nevada Supreme Court ruled on the merits of  
9 this claim. Although the Nevada Supreme Court did discuss the merits, that discussion was in the  
10 context of whether petitioner suffered prejudice from the procedural bar. A discussion of the merits  
11 in the analysis of cause and prejudice is not a determination on the merits. Moran v. McDaniel, 80  
12 F.3d 1261, 1269 (9th Cir. 1996). Ground 6 is procedurally defaulted.

13 Petitioner cites Martinez v. Ryan, 132 S. Ct. 1309 (2012), as cause to excuse the procedural  
14 default. The holding in Martinez is very limited. “Inadequate assistance of counsel at initial-review  
15 collateral proceedings may establish cause for a prisoner’s procedural default of a claim of  
16 ineffective assistance at trial.” Id. at 1315. Ground 6 is not a claim of ineffective assistance of trial  
17 counsel. Consequently, Martinez is inapplicable.

18 Petitioner does not argue in this court that he suffered any prejudice. Nonetheless, this court  
19 agrees with the Nevada Supreme Court’s determination. At the sentencing hearing, the trial judge  
20 stated, “I’m going to run Count one concurrent to Count two; Count two consecutive to Count  
21 Three, Count One concurrent to Count Three as well.” Ex. 29, at 8 (#18) (emphasis added). Then,  
22 the judge stated, “Two and three are consecutive. Everything—Count one’s concurrent to two and  
23 three.” Id. However, the original judgment of conviction stated that count 2 would run concurrent  
24 with count 1 and that count 3 would run concurrent with count 1 and consecutive to count 2. Ex.  
25 30, at 2-3 (#18). The sentencing hearing indicated that count 2 would run consecutive to count 3,  
26 and the judgment indicated that count 3 would run consecutive to count 2. The Nevada Supreme  
27 Court did not remand because it determined that consecutive sentences were improper. The Nevada  
28 Supreme Court remanded for the district court to clarify which sentence runs first. See Ex. 48, at

1 14-15 (#19). The amended judgment of conviction cleared up the matter. See Ex. 54 (#19). The  
2 crux of the matter is that the district judge always intended petitioner to serve consecutive sentences  
3 on counts 2 and 3, even if the sentencing hearing and the original judgment were confusing. The  
4 amended judgment did not increase the amount of time that petitioner will spend in prison.

5 Petitioner is confused how counts 2 and 3 can run concurrently with count 1 and consecutive  
6 to each other, but the district court structured the sentences that way for petitioner's benefit.  
7 Petitioner stated himself in his fast-track statement on direct appeal, "[B]y ordering Count 2 and  
8 Count 3 to run concurrent with Count 1, the district court gave Reynaldo credit for time served on  
9 all counts as allowed under [Johnson v. State, 89 P.3d 669 (Nev. 2004)]." Ex. 43, at 6 (#19). See  
10 also Nev. Rev. Stat. § 173.055(1). The 498 days of credit for time spent in jail applies to the  
11 sentences for count 1, count 2, and, when he begins serving it, count 3. If the trial judge ordered  
12 counts 1 and 2 to run concurrently and count 3 to run consecutively to counts 1 and 2, then  
13 petitioner would not have received 498 days of credit at the start of his sentence for count 3.  
14 Petitioner has suffered no prejudice from the procedural default of ground 6, and the court dismisses  
15 that ground.

16 Respondents argue that ground 8 is conclusory. In ground 8, petitioner claims that trial  
17 counsel should have investigated the origin of a microscopic particle of lead barium and antimony  
18 that was found on petitioner's hand. Petitioner presented this ground in his state habeas corpus  
19 petition. On appeal, the Nevada Supreme Court ruled:

20 Appellant next claimed that he received ineffective assistance of trial and appellant counsel  
21 for their respective failures to investigate trace physical evidence found on appellant's hands.  
22 Appellant failed to support these claims with specific facts that, if true, would have entitled  
23 him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that  
"bare" or "naked" claims are insufficient to grant relief). We therefore conclude the district  
court did not err in denying these claims.

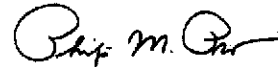
24 Ex. 87, at 2 (#20). That is a ruling on the merits, and it is sufficient for this court to determine  
25 whether the ruling was a reasonable pursuant to 28 U.S.C. § 2254(d)(1). The court will not dismiss  
26 ground 8.

1 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#16) is **GRANTED** in  
2 part. Grounds 1(2) and 5 are unexhausted, and they are **DISMISSED** with prejudice because they  
3 lack merit. Ground 6 is **DISMISSED** with prejudice because it is procedurally defaulted.

4 IT IS FURTHER ORDERED that respondents shall file and serve an answer or other  
5 response to the remaining grounds within forty-five (45) days after entry of this order. The answer  
6 shall comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District  
7 Courts.

8 IT IS FURTHER ORDERED that petitioner shall have forty-five (45) days from the date on  
9 which the answer is served to file and serve a reply.

10 DATED: March 13, 2013.

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12 PHILIP M. PRO  
13 United States District Judge  
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